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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 909

GIFFEN INVESTMENT COMPANY, PHILLIPS PETROLEUM COMPANY, SEABRIGHT-OSWEGO FALLS CORPORATION, and UNION PACIFIC RAILROAD COMPANY, *Petitioners*,

v.

STATE OF KANSAS EX REL. JOHN ANDERSON, JR., Attorney General; THE CITY OF KANSAS CITY, KANSAS, a Municipal Corporation; PAUL F. MITCHUM, Mayor-Commissioner; EARL B. SWARNER, Commissioner of Finance, Health and Public Property; JOSEPH P. REGAN, Commissioner of Boulevards, Parks and Streets; and QUINDARO TOWNSHIP, WYANDOTTE COUNTY, KANSAS, a Body Politic and Corporate, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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v.

STATE OF KANSAS EX REL. JOHN ANDERSON, JR., Attorney General; THE CITY OF KANSAS CITY, KANSAS, a Municipal Corporation; PAUL F. MITCHUM, Mayor Commissioner; EARL B. SWARNER, Commissioner of Finance, Health and Public Property; JOSEPH P. REGAN, Commissioner of Boulevards, Parks and Streets; and QUINDARO TOWNSHIP, WYANDOTTE COUNTY, KANSAS, a Body Politic and Corporate, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas entered in the above case in an original proceeding in that Court.

OPINION BELOW

The opinion of the Supreme Court of Kansas is reported at 186 Kan. 190, and is printed at Appendix

A, *infra*. The report of the Commissioner appointed by the Supreme Court of Kansas, as amended, which is unreported, is printed at Appendix B, *infra*.

JURISDICTION

The order of the Supreme Court of Kansas dismissing the action was issued on March 5, 1960. (App. A, p. 2a) Petitioners sought no rehearing. A motion for rehearing was timely filed by respondent Quindaro Township, and that motion was denied on April 13, 1960. (R. 222) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners were denied due process of law under the Fourteenth Amendment when they were refused the right to challenge, or to have challenged on their behalf, the legality of municipal ordinances purporting to annex their property to a municipality so as to subject it to the taxing and regulatory authority of that municipality when under state law the legality of the ordinances cannot subsequently be challenged by petitioners in resistance to the taking of their property by municipal taxation and regulation.

2. Whether petitioners were denied the equal protection of the laws guaranteed by the Fourteenth Amendment when the Supreme Court of Kansas permitted the Attorney General of Kansas to dismiss as a matter of absolute right the only proceeding whereby a judicial determination could be secured as to the legality of municipal ordinances purporting to annex the property of petitioners so as to subject it to the taxing and regulatory authority of a municipality, when the sole ground relied on in the Attorney

General's motion to dismiss was the fact that two prior actions had been maintained challenging previous ordinances purporting to annex petitioners' property, each of which actions had resulted in a judicial decision that the ordinances were illegal and void.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioners are the owners of real and personal property in Quindaro Township, Wyandotte County, Kansas, in an area known as the Fairfax Industrial District, which adjoins Kansas City, Kansas.

Under the law of Kansas municipalities such as Kansas City possess only such powers as are conferred upon them by the legislature of the State. The Kansas legislature has delegated to such municipalities a portion of its legislative authority to provide for the annexation by a municipality of property lying outside its borders. Kansas G.S. 1959 Supp., Sec. 13-1602a. The authority delegated is limited and conditional, and any purported annexation by a municipality is under Kansas law invalid unless the terms of the enabling statute are adhered to. See *Atchison & N. R. Co.* v. *Maquilkin*, 12 Kan. 301, 304 (1873).

For a number of years, the municipal authorities of Kansas City have sought to annex to that municipality

parts of the Fairfax Industrial District which include property belonging to petitioners. The first two attempts failed. In each case the municipality passed ordinances purporting to annex the territory pursuant to the statutory authority above described, and in each case, upon *quo warranto* proceedings brought on the relation of state officials as original actions in the Supreme Court of Kansas, the ordinances were declared by the Supreme Court to be wholly invalid and unlawful, because not within the authority delegated by the state legislature to the municipality. See *State ex rel. Fatzer* v. *Kansas City,* 169 Kan. 702, 222 P.2d 714 (1950); *State ex rel. Martin* v. *Kansas City,* 181 Kan. 870, 317 P.2d 806 (1957).

These setbacks did not, however, deter the Kansas City municipal authorities, who thereafter enacted and promulgated six additional ordinances purporting to annex portions of the Fairfax Industrial District, including a portion of the property of each of the petitioners situated therein. On the relation of the county attorney of Wyandotte County, *quo warranto* proceedings were promptly once more instituted in the name of the State of Kansas, naming the City, three of its officials, and Quindaro Township as defendants. The City and its officials answered, admitting a major portion of the complaint, including the allegations as to the invalidity of two of the six ordinances involved, and joining issue on the remainder of the complaint. In accordance with state practice the case was referred by the Supreme Court to a Commissioner for the taking of evidence.

On July 22, 1959, the Attorney General of Kansas, who theretofore had taken no part in the proceedings, filed motions to intervene and to supersede the county

attorney as relator, to strike all pleadings filed by Quindaro Township on the ground that the township had no justiciable interest in the controversy, and to dismiss the *quo warranto* proceeding. The sole ground stated in support of the motion to dismiss was that in view of the expense of the prior litigation had in connection with the two prior illegal attempts at annexation, it would not be in the public interest to continue the action.

Quindaro Township opposed each of these motions, pointing out that the case was ready for trial before the Commissioner on the merits and that the design of the Attorney General's attempted action was to prevent a judicial determination of a concededly justiciable controversy. On a hearing on the motions before the Commissioner, the township also noted that the Governor of Kansas had formally directed the Attorney General to proceed with the case in order that substantial rights should not be forfeited without a hearing, and argued that under these circumstances the Attorney General had no authority to dismiss the action.

At the same time petitioners, who had until then considered their interests to be adequately represented by the county attorney, filed applications to intervene in the case. The applications alleged that if the disputed ordinances were permitted to go into effect petitioners would be subjected to the burden of city taxes, regulation and control, and that to permit the permanent frustration of a judicial determination of the question of the validity of the ordinances would thus be to deny to them due process of law under the Fourteenth Amendment. The applications further

alleged that to grant the Attorney General the arbitrary and unlimited power to decide whether private rights would be made the subject of judicial determination would deny to petitioners the equal protection of the laws in contravention of the Fourteenth Amendment. They asked that the Attorney General be compelled to continue the action to a decision on the merits, or that petitioners be permitted themselves to maintain the action as relators for the State of Kansas, in order that their rights might be judicially determined.

The Commissioner ruled that the Attorney General had no authority to supersede the county attorney or to dismiss the action. Accordingly, he denied petitioners' motions to intervene on the ground that their interests would be adequately protected by having the *quo warranto* action go forward between those already parties thereto.

The Supreme Court of Kansas rejected the Commissioner's ruling that the Attorney General was not empowered to supersede the county attorney and held that he might make this supersession and proceed immediately to dismiss the action. It further held that Quindaro Township had no authority to continue the action on its own behalf. Finally, it denied petitioners' applications to intervene, which had been renewed before it, on the ground that under Kansas law a proceeding to test the validity of a city's attempt to extend its boundaries can be maintained only by the State, acting on the relation of public officials.[1]

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[1] The Supreme Court of Kansas had previously held that an action questioning the legality of a municipal ordinance annexing territory could be prosecuted only in the name of the State, at the instance of a county attorney or the Attorney General. Smith v. City of Emporia, 168 Kan. 187, 211 P.2d 101 (1949).

The effect of these rulings was altogether to preclude a decision as to the legality of the challenged ordinances and to subject petitioners to a taking of their property by municipal taxation and regulation even if that taxation and regulation is in violation of law.

Petitioners' claims of denial of due process and equal protection under the Fourteenth Amendment were made explicitly in their original applications to intervene (R. 94, 113, 147-148, 167-168), were renewed in their brief on the Attorney General's appeal from the Commissioner's decision to the Supreme Court (See Brief on Behalf of Petitioners to Intervene, R. 209, pp. 4-11), and were adverted to and rejected by the Supreme Court in its opinion (See App. A, pp. 12a-13a). Accordingly, this Court has jurisdiction to pass upon these claims.

REASONS FOR GRANTING THE WRIT

The decision of the Kansas Supreme Court has denied to petitioners a fundamental right guaranteed them by the due process clause of the Fourteenth Amendment—the right to be heard as to the legality of the taking of their property at some point before that property is irretrievably lost.

Petitioners are seeking in this case to secure an adjudication as to the validity of municipal ordinances purporting to annex their property to a municipality. The concrete and substantial effect of the ordinances upon petitioners is clear. The adjudication which they seek is one of a concededly justiciable issue. Indeed, at the time of the intervention by the Attorney General the issue was about to be adjudicated on the

merits. There is no other form of proceeding in which petitioners or anyone else can raise this issue in the Kansas courts, now or at any future time. See *Smith* v. *City of Emporia*, 168 Kan. 187, 211 P.2d 101 (1949); *Smith* v. *City of Prairie Village*, 175 Kan. 469, 264 P.2d 1053, 1055 (1953). If petitioners are not now permitted to secure a judicial determination as to the legality of the ordinances they will be wholly without a remedy when the City of Kansas City takes their property by taxation, although that taking is unlawful unless the ordinances of annexation are valid.

It will hardly be denied that to permit a municipal corporation to impose taxes upon petitioners without warrant in law would be a taking of property in violation of the due process clause. *Cincinnati* v. *Louisville & N. R. Co.*, 223 U.S. 390, 400; *Portland Ry., Light & Power Co.* v. *City of Portland*, 181 Fed. 632 (C.C.D. Ore. 1910), *appeal dismissed*, 218 U.S. 686. If the ordinances are valid petitioners have no basis for complaint. On the other hand, if they are invalid, and petitioners are given a judicial hearing on the merits of their claim of invalidity, the illegality of the ordinances will be determined by the Supreme Court of Kansas, as has been done in many prior Kansas cases. The substance of petitioners' position is that to deny them any opportunity for a hearing on the question of illegality, as the court below did, is to deny them due process of law.

In rejecting petitioners' contention that the due process clause entitled them to be heard, either in person or through a representative of the State, on the question whether the ordinances were within the authority conferred on the municipality by the legislature, the Kansas Supreme Court relied on the

proposition that "a state legislature has absolute power to make and change subordinate municipalities such as counties, towns and school districts because they are auxiliaries of the state." (App. A, p. 12a) The difficulty with this proposition as a rule of decision in this case is that it is wholly unresponsive to the issue sought to be tendered by petitioners.[2] Petitioners have throughout this litigation conceded, and now concede, that had the legislature of Kansas passed a statute in precisely the same language as that of the ordinances here sought to be attacked, they would have no basis for complaint. In such circumstances they would have no right to a hearing because there would be nothing to hear. See *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 709-710. This is not because under these circumstances there would be no deprivation of petitioners' property, but because a valid legislative enactment can work such a deprivation consistent with due process of law. See *Davidson* v. *New Orleans*, 96 U.S. 97. This is the basis of such cases as *Kies* v. *Lowrey*, 199 U.S. 233, and *Hunter* v. *Pittsburgh*, 207 U.S. 161, relied on by the court below.

The question as to which petitioners seek to be heard is whether the conditions necessary for the rule above stated to come into play are here present. The validity of the ordinances here sought to be attacked depends entirely on whether they were passed as an exercise of powers delegated to the City of Kansas City by the legislature of Kansas. For in Kansas, as elsewhere,

[2] The proposition itself is subject to some limitations. See Mount Pleasant v. Beckwith, 100 U.S. 514, 533. Compare Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959), *cert. granted*, 28 U.S.L. Week 3271, March 22, 1960.

municipal corporations possess only such powers as are conferred upon them by the State. See *State* v. *Hannagan,* 161 Kan. 492, 170 P.2d 138 (1946); *Russell State Bank* v. *Steinle,* 159 Kan. 293, 153 P.2d 906 (1944); *Kansas Gas & Elec. Co.* v. *City of McPherson,* 146 Kan. 614, 72 P.2d 985 (1937), *appeal dismissed,* 303 U.S. 624. The legislature of Kansas has concededly not delegated to the municipalities of that State all the powers which it possesses in the field of annexation or change of municipal boundaries. Were petitioners to be permitted a hearing on the question whether the ordinances are consistent with the enabling statute, or were the Attorney General required to litigate that question on their behalf, adjudication by the Kansas Supreme Court that the ordinances were not in fact within the statute would have the effect under Kansas law of rendering the City powerless to tax or to regulate petitioners' property. This in fact was the result of two previous attempts by the municipality to accomplish an annexation of petitioners' property by ordinance. *State ex rel. Fatzer* v. *Kansas City,* 169 Kan. 702, 222 P.2d 714 (1950); *State ex rel. Martin* v. *Kansas City,* 181 Kan. 870, 317 P.2d 806 (1957).

Had the Supreme Court of Kansas ruled that the action of the City of Kansas City was within the powers delegated to it by the state legislature, this would have ended the matter so far as this Court is concerned. The Supreme Court of Kansas, however, did not so rule. Its holding rather was that if the Attorney General in his sole discretion and for any reason decided to prevent adjudication of this question, petitioners are utterly without remedy. This result is plainly inconsistent with holdings of this

Court that even in an area of regulation where a state legislature has plenary authority, if the legislature does not delegate full legislative power but rather makes a conditional grant of power, one whose rights are affected by a purported exercise of the delegated power is entitled to a hearing as to the validity of that exercise. *Embree* v. *Kansas City Road District*, 240 U.S. 242, 247; *Browning* v. *Hooper*, 269 U.S. 396, 405-406; *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 166-167, 174-175; *Parsons* v. *District of Columbia*, 170 U.S. 45, 52. See also *Southern Ry. Co.* v. *Virginia*, 290 U.S. 190, 197.

The decision below, which denies to petitioners a judicial determination of the question whether the authority which purports to take their property is lawfully exercised, thus deprives petitioners of due process of law, which in its procedural aspect requires, minimally that one whose property is to be taken shall have the right to be heard as to questions which are admittedly decisive as to the validity of the taking.

The result of the decision of the Kansas Supreme Court is also to deny to petitioners the equal protection of the laws of Kansas, by depriving them of a remedy available to others similarly situated. For under Kansas law property owners affected by the promulgation of municipal ordinances purporting to annex their property and to subject it to the taxing and regulatory authority of the annexing municipality are not always without a remedy to test the validity of the ordinances. Their rights traditionally are asserted in the name of the State itself, acting upon the relation of the county attorney or the State Attorney General, and this mode of proceeding, if carried to

judgment on a truly adversary basis, would appear sufficient to meet the requirements of procedural due process as to petitioners.[3]

The Kansas court has here held, however, that the availability of this remedy to petitioners is a matter to be determined conclusively and finally by the *ex parte* decision of the State Attorney General. It has ruled that that officer has "an absolute right to dismiss the action" (App. A, p. 13a), and thus to frustrate at the last moment a judicial determination of the merits of petitioners' claim as to the invalidity of the ordinances at issue.

Petitioners submit that this extraordinary rule permits, and has here resulted in, precisely the sort of arbitrary and invidious discrimination which the equal protection clause is designed to prevent.

A statement of the reason given by the Attorney General for his decision to dismiss the action demonstrates the constitutional invalidity of the classification which it implies. In his motion to dismiss the Attorney General stated, in the words of the court,

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[3] Representatives of the State have in a large number of cases instituted and maintained proceedings challenging the exercise of authority by municipalities on the ground that that authority has not been validly conferred upon them. See, *e.g.*, State *ex rel.* Forsyth v. City of Chanute, 179 Kan. 155, 292 P.2d 687 (1956); State *ex rel.* Hawks v. City of Topeka, 176 Kan. 240, 270 P.2d 270 (1954); State *ex rel.* Martin v. Tucker, 176 Kan. 192, 269 P.2d 447 (1954); State *ex rel.* Gray v. Board of Education, 173 Kan. 780, 252 P.2d 859 (1953); State *ex rel.* Hawks v. City of Topeka, 175 Kan. 488, 264 P.2d 901 (1953); State *ex rel.* Hawks v. City of Topeka, 173 Kan. 387, 246 P.2d 250 (1952). And as mentioned above, ordinances purporting to annex the very property here involved have twice been declared unlawful by the Kansas Supreme Court upon challenge by the public authorities.

that "in view of the expense to the taxpayers of past litigation on this annexation problem of the city, it would be in the public interest to terminate and dismiss the present action." (App. A, p. 3a)

Petitioners do not believe that a classification consistent with the equal protection clause can be made between persons who have twice previously been subjected to the attempted taking of their property by ordinances declared by the state's highest court, upon challenge, to be illegal, and persons who are subjected for the first time to the threat of an annexation which they believe to be unlawful. Although the equal protection clause permits classification when based on any actual distinction germane to the basis of the classification, it cannot tolerate a distinction which places a premium on repetition of illegality, and penalizes petitioners because they have been the near victims of illegality in the past.[4]

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[4] In his brief before the Supreme Court of Kansas the Attorney General suggested that his exercise of his absolute right to dismiss rested on consideration of "the welfare of the State as a whole, whose people have a concern lest the natural expansion of their second largest city be unduly hampered and lest those who have the benefits of a great urban center refuse to contribute fairly to their cost." (Brief of John Anderson, Jr., Attorney General of the State of Kansas, R. 207, p. 40) In a society based on government under law, it is hardly consistent with the equal protection clause for some persons to be denied access to the courts to contest illegal action because an executive official believes that in the particular case it is in furtherance of "the welfare of the State as a whole" to have the illegality go unredressed.

Finally, in his reply to a Motion for Rehearing filed in the Kansas Supreme Court by Quindaro Township, the Attorney General suggested that his dismissal rested in part on his conviction that the ordinances in question were valid. But "to one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process

Even had the Attorney General not explicitly disclosed the invalid standard applied by him in discriminatorily denying petitioners the opportunity for a judicial determination of the legality of the ordinances, the very fact that the decision below has made petitioners' right to such a determination depend wholly on the decision of an executive official, acting *ex parte* and without limitation upon the range of his discretion, in itself is a denial to petitioners of any meaningful equality under the law. The Attorney General argued to the Kansas Supreme Court that his right to dismiss was unconditional, and the court so ruled. Where, as here, substantial private rights are at stake the opportunity for access to the courts may not, consistent with the Fourteenth Amendment, be thus accorded to some and denied to others in the unfettered discretion of a public official. Compare *Cochran* v. *Kansas*, 316 U.S. 255; *Griffin* v. *Illinois*, 351 U.S. 12.

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of law would have led to the same result because he had no adequate defense upon the merits." Coe v. Armour Fertilizer Works, 237 U.S. 413, 424. And even this statement, which plainly has "the usual infirmity of *post litem motam*, self-serving declarations", United States v. Rumely, 345 U.S. 41, 48, was coupled with another reference to the fact that the City had in the past been "harassed" by having to litigate in defense of ordinances which were found in the litigation to be illegal and void. Further, it is in striking contrast to the judicial admission of the City itself that two of the ordinances here involved are in fact unlawful.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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